NO. 22535 & 22535-A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

- -

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

BRIEF OF APPELLANT ECONO-CAR INTERNATIONAL, INC.

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER
500 Electric Building
P. O. Box 2529
Billings, Montana 59101

Filed _____, 1968

_____, Clerk

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II. STATEMENT OF JURISDICTION

Jurisdiction of the district court is based upon 28 U.S.C.A. § 1332. The complaint (R. 6)* alleges that defendant Econo-Car International, Inc. is a New Jersey corporation and demands judgment in the sum of $70,179.86. Defendant's petition for removal (R. 2) alleges that plaintiff is a citizen and resident of the State of Montana and that defendant Econo-Car International, Inc. is a New Jersey corporation with its principal headquarters and place of business at Union, New Jersey. The matter in controversy exceeds $10,000.00 and is between citizens of different states. Jurisdiction has not been disputed.

The district court denied defendant's motion for partial summary judgment and ruled on defendant's motion for protective orders in its order dated August 7, 1967, (R. 35). The case was tried to a jury. Judgment was entered in favor of the plaintiff in the sum of $7,052.00 on August 16, 1967, (R. 82). An order was entered denying plaintiff's motion for new trial and denying defendant's motions for judgment notwithstanding the verdict and for a new trial on September 20, 1967, (R. 87). Defendant filed its notice of appeal on October 18, 1967, (R. 88). Plaintiff filed its notice of appeal on October 24, 1967, (R. 89).

Defendant filed designation of parts of record and

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* The original papers volume of the record on appeal will be cited as follows: (R.___). The reporter's transcript of the trial proceedings will be cited as follows: (Tr.V.___, p.___).

statement of issues on October 27, 1967, (R. 90). Plaintiff filed designation of record on appeal on November 13, 1967, (R. 92). The appeal was docketed on January 18, 1968. Jurisdiction of this court is invoked under Title 28, U.S.C.A. § 1291.

III. STATEMENT OF THE CASE

In the spring of 1963 plaintiff Carl Taute, while employed in a management capacity for a wholesale grocery company in Billings, Montana, responded to an advertisement in the business opportunity section of the Billings Gazette. As a result, contact was established between plaintiff and defendant Econo-Car International, Inc. franchise salesmen, Mr. Burko and Mr. Alvarez. (Tr.V.I, p.26).

At their second meeting held on or about June 28, 1963, plaintiff signed an agreement (Pltf.'s Exh. 6 (a photocopy is Appendix "A" hereto)) to become defendant's local franchisee in Billings, Montana, for the operation of an Econo-Car rental business. Plaintiff and his wife were allowed to testify over defendant's objections that prior to their signing the agreement Burko made certain false representations to them, which will be set forth in more detail below. Many of the questions raised on this appeal revolve around whether testimony of these representations was properly admissible. At the time of the execution of franchise agreement by Taute he paid to Mr. Burko the franchise fee in the sum of $6,000.00 (Tr.V.I, p.68). A few days later Taute paid to Burko an additional sum of $2,345.00 which included a security deposit on 10 automobiles of $1,000.00 and the first month's rental of 10

vehicles in the sum of $1,345.00 (Tr.V.I, p.69).

Plaintiff attended a seminar in Elizabeth, New Jersey for new Econo-Car franchisees held on August 16 and 17, 1963 (Tr.V.II, p.126). He stated that it was a well organized program designed to teach novices how to run a car rental operation and that "it took two days and we worked" (Tr.V.I, pp.46-47). On the second day of the seminar, August 17, 1963, plaintiff learned that those alleged misrepresentations made to him by Mr. Burko on June 28, 1963, which he was allowed to testify about at the trial, were all false (Tr.V.II, pp.127-128). Thereafter, on or about October 15, 1963, plaintiff terminated his employment at Ryan Grocery Company (Tr.V.II, p. 130). On October 23, 1963, Taute took delivery of his automobiles (Tr.V.II, pp.129-130) and he had his grand opening of Econo-Car of Billings on October 24 or 25, 1963 (Tr.V.II, p. 129).

Carl Taute operated an Econo-Car rental business in Billings from the time of his grand opening in October 1963 until February 15, 1965, or for a period of about 16 months (Tr.V.II, p.130). He mailed his notice of termination (Pltf.'s Exh. 21) under the terms of the contract to Econo-Car International, Inc. on November 14, 1964. (Tr.V.II, p.130).

Plaintiff filed this action on March 25, 1965, seeking damages in the sum of $70,179.86 (R. 6). By the first claim of plaintiff's complaint he sought damages for alleged breaches of contract and by the second claim he sought damages for fraud in the inducement of the contract based upon Burko's allegedly false misrepresentations. Defendant by its answer

and amended answer (R. 16, 30) denied any breach of contract or fraud and asserted that plaintiff waived any right that he may have had to recover damages for fraud, that he accepted and ratified any changes in the contract, and that he was guilty of laches and estopped from claiming damages by reason of his proceeding with the contract after early learning of the falsity of their alleged misrepresentations.

Defendant filed a motion for summary judgment as to plaintiff's claim for damages for fraud and a motion to exclude testimony as to any representations made by Burko prior to the execution of the contract which would tend to add to, vary, contradict or alter the terms of the written contract. (R. 32). The court denied the motion for partial summary judgment and granted in part and denied in part defendant's motions for exclusion of testimony regarding Burko's alleged misrepresentations (R. 35).

After a trial before the court with a jury, the jury brought in a verdict for the plaintiff in the sum of $1,052.00 on plaintiff's first claim and for the sum of $6,000.00 on plaintiff's second claim, and judgment was entered thereon. (R. 80-81). Defendant filed a motion for judgment notwithstanding the verdict (R. 83) and both parties filed a motion for new trial (R. 83, 85), all of which motions were denied (R. 87). Both parties filed notices of appeal from the judgment of the district court (R. 88, 89).

The first question raised by defendant relating to plaintiff's claim for fraud is: Was evidence of statements allegedly made by Burko to plaintiff prior to the execution

of the written agreement inadmissible because such statements were oral representations relating directly to the subject matter of a contract and tended to alter or add to the stipulations of written contract?

The full substance of the testimony concerning Burko's statement is as follows:

(a) That he had had a survey of Billings conducted and that as a result Econo-Car International, Inc. knew the top three locations in Billings for a car rental business (Tr.V.I, pp.37-39; Tr.V.II, pp.229, 230, 233).

(b) That defendant would send a three man crew to Billings who knew the top three locations, who would call on logical prospects for car rental business, develop substations and generally assist overall in the first few weeks of the business (Tr.V.I, p.40; Tr.V.II, p.230).

(c) That every cent of the $6,000.00 franchise fee would be spent in getting the operation going (Tr.V.I, pp.41,42; Tr.V.II, p.243), and that there would be three full pages of newspaper ads in our local paper in connection with the grand opening (Tr.V.I, p.40; Tr.V.II, p.234).

(d) That plaintiff had the option of deciding the term of the lease between 12 and 18 months as an explanation of paragraph 2 of Schedule B to plaintiff's Exhibit No. 6 (Tr.V.I, p.44; Tr. V.II, p.235).

Each of these elements of extrinsic negotiation were dealt with in the franchise agreement (Pltf.'s Exh. 6 and App. "A" hereto) as follows:

Item: Selection of premises and guidance in setting up operations and sales promotion.

Provisions in Contract (Paragraph 4.C.)

"4. ECONO-CAR AGREES:

* * *

"C. To furnish guidance to the ECONO-DEALER in establishing, operating, and promoting the business of renting automobiles, with respect to:
a) The selection of premises for the establishment of places of business.
b) The institution and maintenance of effective and proven office management systems and business operations procedures.
c) The institution of an effective and continued sales promotion campaign, making available to the ECONO-DEALER sales and promotional aids above and beyond the Basic ECONO-DEALER's kit, as and when such aids are developed by ECONO-CAR's staff."

Item: Field representatives.

Provision in Contract (Paragraph 1 of Schedule "A")

"The following items are included in the new ECONO-DEALER's Set-Up Kit:

"1. The ECONO-CAR OPERATIONS AND PROCEDURES MANUAL is the ECONO-DEALER's best friend. All facets of the ECONO-DEALER's operation are discussed in depth. All new ECONO-DEALERS are invited to attend THE ECONO-CAR TRAINING SCHOOL in Elizabeth, New Jersey. Here the ECONO-DEALER is taught the Auto Rental Business including the use of all forms and systems. The Operations and Procedures Manual serves as a constant reminder of the things learned at the TRAINING SCHOOL. Specially trained field representatives provide additional on the spot training and help."

Item: Local newspaper advertising.

Provision in Contract (Paragraphs 5 and 6 of Schedule "A")

> "5. ANNOUNCEMENT ADVERTISING: ECONO-CAR places and runs at its own expense ads in the new ECONO-DEALER's newspaper to prepare the area for the new ECONO-DEALER.
>
> "6. PUBLICITY: Publicity releases are made to the ECONO-DEALER's newspaper of the new ECONO-DEALERSHIP."

Item: Term of lease of rental automobiles.

Provision in Contract (Paragraph 2 of Schedule "B")

> " * * * Each lease shall run for a minimum period of twelve (12) months to a maximum of eighteen (18) months. * * *"

Plaintiff's complaints as to the matters referred to in the alleged misrepresentations do not include complaints that the contract as written was breached, but only that the promises made by Burko which expanded upon and added to the written provisions were breached.

A second question presented as to the claim for fraud is whether plaintiff waived any right that he may have had to sue for damages for fraud as a matter of law.

Plaintiff knew or discovered on August 17, 1963, or shortly thereafter, that the statements he asserts were made by Burko were false. (Tr.V.II, pp.127-128, 111-112, 129, 238-240; Tr.V.I, pp. 71-76). As set forth above, plaintiff at that time had not yet quit his job, taken delivery of any automobiles, or commenced operations. He had paid the franchise fee, a deposit and the first month's rental on 10 cars.

On or prior to August 18, 1963, plaintiff signed an

agreement to lease vehicles (Pltf.'s Exh. 7) which provided in paragraph 2 that the term of the lease was 18 months subject to defendant's right to terminate the lease at any time following the first 12 months. (Tr.V.I, p.47). This was contrary to what plaintiff said Burko said was meant by the 12 to 18 month provision of the contract.

Carl Taute on September 14, 1963, in a letter to Mr. Paul McPeake of Econo-Car International, Inc. (Dfdt.'s Exh. 23) outlined in detail the advantages and disadvantages of three prospective locations that Mr. Taute had selected for his Econo-Car dealership in Billings, and then stated in the last paragraph thereof:

> "Paul, know I'm asking a lot--but--would you study this and call me with your recommendation. I'm not trying to put you on the spot--but I would like to draw on your experience--and--should mileage rate on my Plymouths be 10¢?"

Carl Taute stated in his termination letter dated November 14, 1964, (Pltf.'s Exh. 21) that the "only criticism I have to offer is toward myself--simply bit off more than I could chew."

On December 3, 1964, subsequent to the date that he mailed his termination letter to defendant, Carl Taute offered by letter (Dfdt.'s Exh. 24) to continue in business as the Econo-Car dealer in Billings if defendant would provide the performance bond necessary for renting space at the municipal airport in Billings (Tr.V.II, p.133).

Carl Taute and Econo-Car exchanged considerable correspondence between the execution of the franchise agreement and up to two months after plaintiff's grand opening

without any mention being made of Burko's representations or complaint that they had not been fulfilled (Dfdt.'s Exhs. 23, 35, 36, 37 & 46).

Another issue raised here as to plaintiff's claim for fraud is whether plaintiff pled and proved all necessary elements of fraud and whether the jury was properly instructed on fraud.

The second claim of the complaint alleges that certain representations were made by Burko, that they were false, that the defendant knew them to be false, that they were made for the purpose of inducing plaintiff to enter into the agreement, and that plaintiff entered into the contract "by and through" the representations of Burko, and that plaintiff was damaged. Plaintiff's pre-trial memorandum (R. 18) adds no new elements except that at one point the representations are referred to as being "material".

The only testimony in the record relating to plaintiff's reliance upon Burko's representations is Carl Taute's testimony that he relied upon Burko's statement that he knew the three top locations in town (Tr.V.I, p.33). There is no testimony that Carl Taute had a right to rely on the statements and no other testimony that he did so rely on any of the representations. Certain of Burko's alleged statements were in the nature of promises. There is no testimony that these promises were made with the intention that they would not be performed.

Another question raised relative to the fraud claim is whether the jury was properly instructed on the elements of fraud and the damages which could be allowed if fraud were

proved.

The court instructed the jury as follows:

> "Now, before Mr. Taute may recover on his second cause of action, that is the fraud cause of action, he must prove the following:
> 1. That Burko made false representations;
> 2. That Burko knew those statements to be false, and if the statements were promises of what defendant would do in the future, that they were made without any intention of performing them;
> 3. That Mr. Taute relied on these statements; and,
> 4. That he was damaged.
>
> "Now, in connection with damage, if you find that all of the foregoing is true; that is, that defendant has proved these items by a preponderance of the evidence, then the measure of damages here is $6,000.00. Diminished, however, by the amount that you find this franchise was worth on August 17, 1963." (Tr.V.III, pp.281-282.)

Another question raised as to the fraud claim is whether it was error for the court to allow plaintiff to testify that every cent of the franchise fee would be spent in getting the operation going, where this had not been pleaded or mentioned in any pre-trial proceedings; plaintiff testified over objection that Burko stated to him that "we spend every cent of that $6,000.00 franchise fee in getting the operation going . . ." (Tr.V.I, p.42). No mention had been made by plaintiff as to what use was to be made of the franchise fee in the complaint (R. 6) or plaintiff's pre-trial memorandum (R. 18).

The terms and conditions under which vehicles were made available by Econo-Car International, Inc. to Carl Taute and modifications therein made during the period of the operations raise two issues in this case, (1) whether any such changes constituted breaches of the agreement itself and (2)

Carl Taute ratified and confirmed the contract and thereby waived his rights, if any, to claim damages for the alleged fraud in the inducement of the contract.

The franchise contemplated change in the arrangements for the availability of automobiles, by providing in part as follows:

> "4. ECONO-CAR AGREES: . . .
>
> D. To make available to the ECONO-DEALER at all times a quantity of automobiles for use in the daily rent-a-car business on the most favorable terms available. These vehicles may be made available to the ECONO-DEALER on the basis of sale, lease, or whatever other method or methods that ECONO-CAR shall negotiate in behalf of all of its ECONO-DEALERS. . . .
>
> "5. THE ECONO-DEALER AGREES: . . .
>
> C. . . . all vehicles must be acquired by the ECONO-DEALER on the basis described in Schedule "B", or upon such other basis as may be presented by ECONO-CAR for the benefit of the entire ECONO-CAR RENTAL SYSTEM. . . .
>
> E. To operate the ECONO-DEALER's business in accordance with sound business principles, while adhering to the standards set in the ECONO-DEALER's manual, and to any modifications or changes which may be promulgated from time to time by ECONO-CAR for the benefit of the entire ECONO-CAR RENTAL SYSTEM and each of its ECONO-DEALERS." (Emphasis supplied). (Pltf.'s Exh. 6).

Schedule "B" to plaintiff's exhibit 6 provides that each lease thereunder "shall run for a minimum period of 12 months to a maximum of 18 months", but on August 17, 1963, prior to the commencement of any operations, Carl Taute signed plaintiff's exhibit 7 which provided that for the automobiles thereunder the term would be "for a period of 18 months from the date of delivery . . . except that lessor (defendant) shall have the

absolute right, in its sole discretion, to terminate the lease at any time following the 12th month" and then goes on to provide that in the event of early termination that defendant would have to make available replacement vehicles under the same terms and conditions (Para. 2, pltf.'s exh. 7).

In November of 1963 defendant notified plaintiff Carl Taute that there would be a rate reduction with respect to the 1964 automobiles, that the lease term would be changed and that there would be an upgrading of the available automobiles (Pltf.'s Exh. 9; Tr.V.I, p.53, V.II, p.105). Plaintiff paid $129.00 for his 2 door Valiants for the first month as provided in Schedule "B" to the franchise agreement, but the rate change reduced this sum to $118.00 for the following months. With respect to the lease term the rate revision notice stated:

> "All 1964 automobiles will be available on 12-month leasing terms (instead of the previous 18). Either party may, however, extend the term for up to two months. This shorter lease term will mean great savings to you in maintenance and service costs that usually occur between the 13th and 18th months of operation." (Pltf.'s Exh. 9).

In February of 1964, defendant announced a new six-month leasing program to enable Econo dealers to increase their fleet during the busy months. (Dfdt.'s Exh. 39). Plaintiff responded to this proposed program by stating that he was delighted (Pltf.'s Exh. 39).

In August of 1964, in response to an inquiry from plaintiff, Mr. Paul McPeake of Econo-Car International, Inc. advised Carl Taute that if he wanted an extension on the lease to January 2, 1965, he should write in and request it although

Mr. McPeake didn't "know whether Chrysler will go along".

On or about October 5, 1964, Econo-Car International, Inc. announced the leasing program planned for 1965. (Pltf.'s Exh. 10). This leasing program was to be for a 6-months lease term, with the Econo-Car dealer having the option to extend it up to one full year, and Chrysler Leasing Corporation having the option to extend it by one month. The Econo-Car circular dated December 1, 1964, set forth these amendments in more detail (Pltf.'s Exh. 16). Plaintiff took delivery of 7 1965 cars in the fall of 1964, and then terminated his franchise agreement as of February 15, 1965, at which time the cars were turned in.

Another area of controversy is whether there was a breach of the franchise agreement with respect to the insurance provided, and if so, what damages resulted. The franchise agreement (Pltf.'s Exh. 6) provided that defendant was "to provide the Econo dealer, at no additional expense, with standard type automobile insurance" providing for, among other things, collision insurance with no more than $100.00 deductible (Para. 4.E. of Pltf.'s Exh. 6). A similar provision appears in the lease form dated July 10, 1963, executed by Carl Taute at Elizabeth, New Jersey, on or before August 17, 1963 (Pltf.'s Exh. 7, para. 6).

Plaintiff made one monthly payment to defendant for each car. This payment included an unsegregated lump sum for the rental payment as well as the amount attributable to insurance. As of January 1, 1964, the defendant put into effect a premium increase of $5.00 per month per car because of increased

premium costs to it (Pltf.'s Exh. 13). Thus, on a 2 door Valiant plaintiff initially had to pay $129.00 per month which sum included insurance coverage. Following the rate reduction put into effect on December 1, 1963, this sum dropped to $118.00, but went back up to $123.00 as of January 1, 1964, as a result of the insurance premium rate increase (Tr.V.I, pp.63-64; V. II, p.138-139).

In August and September, 1964, Econo-Car International, Inc. notified its dealers, including Carl Taute, that increased insurance premiums forced it to make a choice between increasing its insurance premiums by $8.00 per car per month or going to $250.00 deductible from $100.00 deductible collision insurance coverage. The company elected to go to $250.00 deductible insurance coverage in line with their competitors in the car rental business. (See Pltf.'s Exh. 13 and 14). On September 1, 1964, Carl Taute wrote to Econo-Car International, Inc. asking if he had a choice between paying the additional $8.00 per month to retain the prior coverage, or whether it was mandatory that he go to the $250.00 deductible collision coverage. In a letter dated September 18, 1964, Mr. Paul V. McPeake of Econo-Car International, Inc. informed him that he had no choice (Pltf.'s Exh. 14). Mr. Taute testified in response to the question whether he objected to the company's procedure that he asked for an option so that he could take his choice, and that he didn't know at the time what he would have wanted to do (Tr.V.II, pp.140, 141).

Carl Taute had testified on his deposition that he actually had no actual loss by reason of the insurance coverage

change, that is, that he had had no collision damage to any vehicle during that period exceeding $100. However, at trial, he checked his records again and testified that in fact he had paid a repair bill for a collision subsequent to the time of the deductible coverage change. However, he did not verify the exact amount of the bill and could not testify to the amount that his bill actually exceeded the $100.00 (Tr.V.II, pp. 153 through 155).

Carl Taute testified that he knew that Econo-Car International, Inc. was a fast growing company, that it was only about two years old, and that he did anticipate that there might be changes of a certain type in the operations (Tr.V.II, pp.187-188).

At the time of the increase in the insurance rate by $5.00 on January 1, 1964, Econo-Car instituted a system of 5% cash discount if bills were paid by the 5th of the month. This system was in effect for three months and then was withdrawn to revert to the original agreement (Tr.V.II, pp.106-107). Carl Taute requested and was granted an advance for a number of his lease payments. Econo-Car International, Inc. gave him the 5% discount on payments made with the money loaned to him by Econo-Car International, Inc. (See Tr.V.II, p.199).

QUESTIONS PRESENTED

1) Whether Burko's alleged misrepresentations relating to the subject of the contract made prior to the execution of the contract were admissible.
2) Whether plaintiff waived any right that he may have had to sue for damages for deceit or fraud by his proceeding under the contract as written after his discovery of the falsity of Burko's alleged misrepresentations at a time when the contract was largely executory.
3) Whether plaintiff pleaded and proved all necessary elements of fraud.
4) Whether the jury was properly instructed on the elements of fraud.
5) Whether it was error for the court to allow plaintiff to testify that every cent of the franchise fee would be spent in getting the operation going where this had not been pleaded nor mentioned in the plaintiff's memorandum.
6) Whether plaintiff by proceeding under the contract and accepting and consenting to a number of changes thereto ratified and confirmed the contract as changed and waived his right, if any, to damages for any prior breaches thereof.
7) Whether there was a breach of the contract as to the lease term arrangements, and, if there was, whether plaintiff was damaged thereby.
8) Whether there was a breach of contract as to the insurance terms, and if there was, whether plaintiff proved that he was damaged thereby.

9) Whether the court invaded the province of the jury in its instructions interpreting the lease term and insurance term provisions thereof.

IV. SPECIFICATIONS OF ERROR

1) It was error to allow plaintiff to testify as to statements made by Mr. Burko prior to the execution of the franchise agreement. The full substance of this evidence is set forth on page 5 herein.

The objections urged at trial by defendant to this testimony, in addition to the motion for protective order and for summary judgment as to plaintiff's second claim (R. 32) were as follows:

(a) That such testimony tended to vary or contradict or explain the words of the printed contract, that it was in violation of the parol evidence rule and that it was offered to alter the stipulations of an express contract. (Tr. V.I, p.31).

(b) That the questions called for answers to vary the terms of a written agreement, that it called for answers violating the parol evidence rule, and that it was legally inadmissible to alter the terms of the contract. That some of the representations were beyond the scope of the pleadings in the pre-trial order (Tr. V.I, p.42).

2) It was error to deny defendant's motion for partial summary

judgment as to plaintiff's second claim and to deny any part of defendant's motion for protective orders (R. 32,35).

3) It was error to deny defendant's motion for directed verdict, (termed motion for nonsuit), as to plaintiff's second claim after completion of plaintiff's evidence (Tr.V.II, p.243).

4) It was error to deny defendant's motion to strike all testimony relating to conversations between Mr. Burko, Mr. Alvarez, plaintiff and Mrs. Taute occurring prior to the signing of the franchise agreement (Tr.V.II, pp.243-246).

5) It was error to deny defendant's motion for a directed verdict upon completion of all of the evidence (Tr.V.III, pp. 262-264).

6) It was error for the court to give the following portion of Court's Instruction No. 1:

> "Now, before Mr. Taute may recover on his first -- on his second cause of action, that is the fraud cause of action, he must prove the following: One, that Burko made false representations; two, that Burko knew those statements to be false, and if the statements were promises of what defendant would do in the future, that they were made without any intention of performing them; three, that Mr. Taute relied on these statements, and, four, that he was damaged. Now, in connection with damage, if you find that all of the foregoing is true; that is, that the plaintiff has proved these items by a preponderance of the evidence, then the measure of damage here is six thousand dollars. Diminished, however, by the amount that you find that this franchise was worth on August 17, 1963." (Tr.V.III, pp.281-282).

The objection urged at trial to this portion included that it omitted an important element of the definition of fraud, required to be proved, that of the right to rely upon the repre-

support this instruction and that the record showed as a matter of law that the plaintiff was not entitled to recover any damages on the grounds of fraud, that the evidence showed as a matter of law that the plaintiff confirmed the contract and waived his rights to damages for fraud (Tr.V.III, pp.274-275).

7) It was error for the court to refuse to give defendant's offered Instrustions numbered 1, 2, 3, 4, 10, 11, 12 and 13 (R. 40-44, 47-51).

8) It was error for the court to instruct the jury as follows:

> "With respect to the change in the insurance program you are instructed that it was the duty of the defendant to provide, without charge, collision insurance with one hundred dollar deductible. And I am satisfied that you know what a deductible policy is. Simply means that in the event of a collision and damage the insurance company does not pay the first hundred dollars. Now, unless you find that the defendant proposed an insurance change to which the plaintiff consented, and this could be proved by an oral agreement, as well as by letters or writings, then you may award the plaintiff the damage which he sustained. This damage would be measured by the premium charged for the months it was charged, plus the difference between the value of a collision policy with a one hundred dollar deductible clause and a policy with a two hundred fifty dollar deductible charge. This again spread over the months that the two hundred fifty dollar deductible policy was in force prior to the termination of the contract which was on February 15, 1965." (Tr.V.III, pp.283-284).

The grounds of the objections urged at trial were that the written instruments taken together and plaintiff's testimony indicate that the payment made by the plaintiff for the lease of the cars included the amount of the insurance and the evidence showed that the total amount paid by plaintiff to defendant for the lease of its cars was equal to or less than the amounts that he bargained for under the

original agreement, that this portion of the instruction invades the province of the jury and is not a proper measure of the damages (Tr.V.III, p.275).

9) It was error for the court to give the following instruction:

> "With respect to the claimed breach of the leasing agreement, in this connection I instruct you that unless the plaintiff proposed a change to which the defendant agreed, then it was the duty of the defendant to provide automobiles to the plaintiff for a period of eighteen months after the initial dates of delivery. In this connection nine cars were delivered on October 23, 1963, and one car on November 1, 1963. Now, if you find that by reason of the changes in the lease terms, and specifically I refer to the length of the term of leasing or the turn-back provisions, and again I instruct you that it is necessary that these changes be not consented to by the plaintiff, and if you find that he suffered damage, then you may award him such damage as you may find from the evidence that he did suffer. In this connection, however, I should advise you that the defendant's obligations under exhibit six and seven expired within a few days of April 30, 1965, and so any change in leasing arrangements wouldn't be -- you couldn't consider any damages based upon a projection beyond that time." (Tr.V.III, 284).

The grounds of the objections urged at trial to this instruction included that the instruction was an improper interpretation of the language of the franchise agreement taken together with Plaintiff's Exhibit No. 7, that the evidence showed that plaintiff voluntarily assented to any change in the lease by voluntarily turning in his cars, and that it does not set forth a proper measure of damages (Tr.V.III, p.276). Further objection was made that the instruction invades the province of the jury and interprets the contract contrary to the expressed terms of the contract themselves (Tr.V.III, p.286).

10) It was error to sustain plaintiff's objection to defendant's offered Exhibit No. 49 (Tr.V.III, p.256).

V.

SUMMARY OF ARGUMENT

There is no competent evidence to sustain the verdict of $6,000.00, or any verdict, on plaintiff's claim for damages for fraud in the inducement of the contract. The fraud claim is based solely on alleged oral misrepresentations made by franchise salesman Burko prior to the execution of the contract. All such representations were inadmissible because they related directly to the subject of the contract and tended to add to, vary, alter, and sometimes to contradict the express terms of the contract. All such negotiations and statements were superseded by the written agreement. The court erred in allowing testimony of any such statements.

The representations were all promises as to what would be done in the future except for one statement of an existing fact. The statement as to the existing fact was that Econo-Car International, Inc. had conducted a survey of Billings and as a result thereof knew of the three best locations for a car rental business. Plaintiff admitted that he was not damaged by reason of his location, stating that in his opinion he had a fine location and that he attributed none of his difficulties to his location.

The mere fact that a promise is not carried out is not proof that such promise was made with no intention to perform. There is no evidence that Burko did not intend to perform any of the promises he is said to have made. Without such evidence and regardless of the admissibility of the alleged statements, plaintiff cannot establish a case on the fraud claim.

There was also no evidence that plaintiff relied on

any of the representations except for the representation as to the three best locations, and as to that, plaintiff proved no damages. Fraud is never presumed and must be pleaded and proved. The proof failed here.

Plaintiff was allowed to testify that Burko had promised that the entire franchise fee would be spent on the grand opening. This was not pleaded and its admission was prejudicial error.

The court's charge to the jury omitted certain necessary elements of fraud.

Plaintiff waived any right that he may have had to sue for fraud by ratifying and affirming the contract, by assenting to and requesting changes in the contract, and by his election to "give it a go" under the contract after his early discovery of the alleged fraud at a time when the contract was largely executory. Defendant changed its position by reason of plaintiff's affirmance of the contract, and plaintiff cannot now recover damage for fraud in the inducement of the contract.

Plaintiff failed to prove a breach of the leasing terms of the contract and in any event failed to prove damages resulting from the alleged breach.

The court invaded the province of the jury by its peremptory instruction as to the meaning of the contractual provisions relating to the lease terms and the insurance coverage provisions of the contract.

ARGUMENT

A. THERE IS NO COMPETENT EVIDENCE TO SUSTAIN THE VERDICT FOR FRAUD (Plaintiff's Second Claim)

1. All testimony of statements attributed to Burko was inadmissible for the purpose of showing fraud in the inducement of the contract.

Franchise salesman Burko was said to have made certain false representations at and prior to the time of the execution of the franchise agreement. All such parol evidence was inadmissible under the rule that oral representations preceding the execution of a written contract, even though alleged to be fraudulent, are inadmissible to vary the terms of the contract where the representations relate directly to the matters dealt with in the agreement.

The oral representations to which plaintiff was allowed to testify fall into two categories: first, oral promises as to what would be done in the future relating directly to the subject matter of the written agreement, and, second, a representation as to an act which had been done by Econo-Car and as to knowledge which they then possessed. The promises were:

(1) That defendant would send a three man crew to Billings to assist plaintiff in selecting a location for his car rental business and in getting the operation started,

(2) That there would be three full page ads in the local newspaper in connection with plaintiff's grand opening,

(3) That plaintiff would have the option to decide the term of the lease between 12 and 18 months, and

(4) That every cent of the franchise fee would be spent in getting the operation going.

The representation as to the present fact was that Econo-Car had previously conducted a survey of Billings and that it knew the three top locations for a car rental business therein.

a. Statutes -

R.C.M. 1947, § 93-401-13:

> "An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> > "1. Where a mistake or imperfection of the writing is put in issue by the pleadings.
> >
> > "2. Where the validity of the agreement is the fact in dispute.
>
> "But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 93-401-17, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

R.C.M. 1947, § 13-907:

> "Written contracts--how modified. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

R.C.M. 1947, § 13-607:

> "Effect of written contracts. The execution

> of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

b. Cases on Parol Evidence Rule and Fraudulent Representations -

The leading Montana case setting forth the rule that evidence of oral representations relating directly to the subject of a contract, as opposed to evidence relating to an independent oral agreement on a collateral matter, is not admissible to alter the stipulations of a written contract, even if such representations are alleged to have fraudulently induced a party to enter into the contract is the frequently cited case of Kelly v. Ellis, 39 Mont. 597, 104 Pac. 873 (1909). In Kelly v. Ellis plaintiff Kelly brought an action for damages for fraud or deceit alleging that he had entered into an oral contract, subsequently reduced to writing, with the defendant relating to the sale of a sheep ranch. The written agreement provided for the sale by Kelly to defendant of land, sheep and personal property in Sweetgrass County in exchange for a certain number of shares of capital stock, some cash and a promissory note. Plaintiff alleged that the prior oral agreement and specific oral agreement entered into at the time of the signing of the written agreement provided that he was to be the local manager of the sheep ranch. The complaint alleged that the defendant did not keep and never intended to keep the oral agreement, and that the oral promise was a "most important condition of the agreement", and but for the promise he would not have sold the property. The Supreme Court affirmed the trial court's action

the plaintiff was barred from recovery by R.C.M. 1947, § 93-401-13 (then § 7873, Revised Codes). The Court stated in part:

> "The gist of the complaint is that they have not kept or performed the oral agreement to employ plaintiff as local manager, and that they never intended to keep that agreement when they made it. However, for the violation of that promise the statute stands as an insuperable barrier between plaintiff and any recovery, unless the promise to employ him was a matter collateral to the principal agreement.
>
> * * *
>
> "There is not any attack made upon the validity of the written agreement; and, since it appears from the complaint that at the time the plaintiff signed the written contract upon April 17th he fully understood and appreciated that it did not contain any provision for his employment as local manager, but nevertheless voluntarily signed it, he will not be heard to say now that such writing does not contain all the terms of the agreement for the sale of his real and personal property in Sweet Grass County, and he cannot bring himself within either of the exceptions noted in the statute above. However, the writing of April 17th, only superseded all the oral negotiations and stipulations between the parties so far as such negotiations and stipulations related to the matter of their agreement. The Code so provides in unmistakable terms: 'The execution of a contract in writing, whether the law requires it to be written or note, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' Section 5018, Rev. Codes. It did not necessarily supersede all their prior or contemporaneous negotiations; and, if the defendants by fraud or deceit, with respect to some collateral matter, induced the plaintiff to sign the writing, then he might be heard to complain.
>
> * * *
>
> "Unfortunately for plaintiff, he consented to the writing of April 17th, which completely superseded the prior oral negotiations, including the promise to employ him, and the statutes of this state now forbid him to say that there ever was any oral promise for his employment. In frankly stating all the facts out of which this controversy arose, the plaintiff has successfully pleaded himself out of court. His complaint does not state any

In Continental Oil Co. v. Bell, 94 Mont. 123, 21 P.2d 65 (1933) plaintiff and defendants entered into contracts for the purchase and sale of gasoline, which provided for the "price to be charged for gasoline . . . to be four cents per gallon less than the seller's quoted tank wagon price . . ." 21 P.2d at p. 66. Defendants testified that at the time the contracts were negotiated it was orally agreed that if at any time the contract price was more than the "spot market price", the defendants were to receive a refund of the difference between the two prices. The court held that such testimony was inadmissible, stating in part:

> "The test as to when parol evidence varies, adds to, or contradicts a written contract was announced by this court in Hosch v. Howe, 92 Mont. 405, 16 P.(2d) 699, 700, quoting from Professor Wigmore as follows: 'The chief and most satisfactory index is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element.'
>
> * * *
>
> "It is insisted that an oral contract which is the inducement of the written contract may be received in evidence. We recognize the existence of such a rule, but its application turns on the question of the admissibility of the evidence to establish fraud. The exception does not apply to a case in which the oral promise relates directly to the subject of the contract, even though the claim be that the complaining party signed the instrument in reliance on such promise." 21 P.2d at 66-67.

In Leigland v. Rundle Land & Abstract Co., 64 Mont. 154, 208 Pac. 1075 (1922) an action was brought to foreclose a mechanic's lien when the defendant for whom a building was

constructed failed to make all payments allegedly due under the contract. The contract provided for a specific completion date and plaintiff failed to meet that date. Defendant sought to offset the rental value of the building for the period from the specified completion date to the actual completion date against the amounts plaintiff claimed to be due under the contract. Plaintiff alleged that prior to the signing of the agreement he advised defendant that because of business conditions he would not be able to complete the building by the specified date and that defendant thereupon agreed to eliminate a $25.00 per day penalty clause from the agreement and "falsely and fraudulently" agreed not to hold plaintiff to the specified time limit for completion of the contract.

The Montana Supreme Court affirmed the trial court's finding that there were no misrepresentations or fraud and went on to point out that as a matter of law the evidence of the alleged oral agreement was inadmissible as attempt to vary the terms of the written agreement by parol evidence stating:

> "However, the facts pleaded with reference to the oral agreement made prior to or at the time of the signing of the contract of March 30th do not warrant plaintiffs any relief, for it is an attempt to vary the terms of a written agreement by parol evidence.
>
> (Quoting statute.)
>
> "The terms of the agreement were reduced to writing by the parties and under section 10517, R.C.M. 1921, the written agreement is to be considered as containing all of those terms, and no evidence of the terms of the agreement other than the contents of the writing can be given except in the cases mentioned in subdivisions 1 and 2 of said section. This oral agreement is not collateral to, but a part of, the original agreement. Kelly v. Ellis, 39 Mont. 597, 104 Pac. 873. The plaintiffs in this case may not now say that the original written

> contract does not contain all the terms of the agreement, because they cannot bring themselves within either of the exceptions noted in the statute. Section 10517, R.C.M. 1921." 208 Pac. at p. 1078.

See also Biering v. Ringling, 78 Mont. 145, 252 Pac. 872 (1927).

In Warner v. Johns, 122 Mont. 283, 201 P.2d 986 (1949) plaintiff wife brought an action against her former husband to collect $400.00 which she alleged that the defendant had promised to pay her for not asking for suit money, attorneys' fees, costs or a division of their property in her divorce action. Among the allegations was that had it not been for the deception and fraud practiced upon her by the defendant in inducing her to sign a property settlement agreement not containing such provisions, she would have demanded a one-half interest in their property, costs and attorneys' fees. The trial court found for the plaintiff wife, but the Supreme Court reversed, stating in part:

> "Defendant contends that the court erred in admitting evidence of the negotiations between the parties relative to the payment of $400, it being his contention that the written agreement may not be altered by oral testimony regarding the prior negotiations.
>
> * * *
>
> "Plaintiff contends that the general rule stated in (R.C.M. 1947, § 13-607) has no application to separate and distinct oral agreements. But to come within that exception, this court in Continental Oil Co. v. Bell, supra, said the oral evidence 'must not in any way conflict with or contradict what is contained in the written contract. The written contract must remain intact after the reception of the parol evidence.' The effect of the oral evidence here was to change or add to the settlement agreement. Instead of plaintiff merely receiving the personal property which she had theretofore taken from the family home as stated in the written agreement she was to receive an additional $400. This may not be shown by parol evidence." 201 P.2d at pp. 987-989.

There can be no question that the oral representations complained to be fraudulent were dealt with directly in the franchise agreement. Therefore, clearly and unequivocally under the above cases, all such parol testimony was inadmissible. Plaintiff's second claim, for damages for fraud, therefore fails completely because it was based solely upon the alleged fraudulent representations.

Plaintiff is not seeking to rescind the contract, but instead has affirmed the contract and is seeking damages for the alleged breaches thereof in his first claim and damages for fraud in the inducement in his second claim. Thus, we are not concerned here with those cases where parol evidence has been admitted to show that a contract had never taken effect or that what appeared to be a contract was in fact not a contract. Neither are we concerned with cases holding that a purchaser under an executed or nearly executed contract of sale can maintain an action for fraud against the seller for damages for false representations in the inducement of the contract where these representations relate to existing facts as to the quality of the property. A case of this type is Koch v. Rhodes, 57 Mont. 447, 188 Pac. 933 (1920), in which the court held that false statements as to the amount of hay previously produced by land, the number of acres of good bottom land in an inaccessible area, and the number of acres in another tract of land were admissible in an action for damages for fraud. These representations in Koch v. Rhodes, supra, were representations as to present facts going to the quality of the product, whereas here we have alleged promises of future

performance of conditions directly dealt with in the contract.

2. Plaintiff failed to plead and prove all necessary elements of fraud.

a. Elements of Fraud -

The applicable law relating to the elements of fraud and the proof thereof is set forth in Lee v. Stockmen's National Bank, 63 Mont. 262, 207 Pac. 623 (1922) as follows:

> "As defined in our statute, (R.C.M. 1947, § 13-308), 'Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (3) The suppression of that which is true, by one having knowledge or belief of the fact; (4) A promise made without any intention of performing it; or, (5) Any other act fitted to deceive.'
>
> "As to whether actual fraud has been practiced is a question of fact (sec. 7482, Rev. Codes 1921), and the burden of proof is upon the one who alleges it. (Lindsay v. Kroeger, 37 Mont. 231, 95 Pac.839.)
>
> "In order to go to the jury the plaintiff must make out a prima facie case embracing the elements of actual fraud, viz.: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity, or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. (26 C.J. 1062.)" 63 Mont. at pp. 283-284.

b. Plaintiff Failed to Prove Material Elements of Fraud -

Assuming arguendo that the oral representations, or some of them, were admissible on the fraud claim, plaintiff has

nonetheless failed to prove essential elements of fraud. For example, there is no testimony to the effect that Burko's promises, if made, were made without any intention on his part that they be performed. Neither is there any testimony in the record to the effect that plaintiff relied upon the representations, except plaintiff's testimony that he relied upon the statement that Burko knew the three top locations in town (Tr.V. I, p. 39).

All but one of the oral representations are clearly promises as to what would be done in the future. The only representation as to an existing fact is this same testimony as to defendant's knowledge of where the three top locations for a car rental business were. It is significant that the plaintiff testified that he selected his location, that he had no complaints with respect to the location, that he felt it was a very fine spot, and that he did not attribute any of his later difficulties to the location of his business. (Tr.V.II, pp. 133-134). Thus, by plaintiff's own affirmative testimony, no damages flowed from the only oral representation which could be taken as a representation of an existing fact at the time of the execution of the contract, and the only representation as to which plaintiff testified he relied upon. Even as to this representation as to the selection of a location plaintiff's actions showed his complete lack of actual reliance thereon when he wrote to Paul McPeake (Dfdt.'s Exh. 23) apologetically soliciting advice as to his proposed locations stating:

"Paul, know I'm asking a lot--but--would you study this and call me with your recommendation. I'm not trying to put you on the spot--but I would like to draw on your experience--"

With but the one exception mentioned above all the representations alleged to have been made by Burko were promises to perform acts in the future. No proof was offered that at the time of making the promises there was no intent of performing them. Actual fraud is never presumed on the mere fact that a promise is not carried out, is not proof that such promise was made with no intention to perform. Montana law could not be clearer on this point:

> "It is well settled law that the mere fact that a promise is not carried out is not proof that such promise was made with no intention to perform." Reilly v. Maw, 146 Mont. 145, 405 P.2d 440, 445 (1965).

> "It is manifest there is ample evidence to prove each of the foregoing stated matters, except the allegation, a most essential one, that, when defendant made his promise, he had no intention of performing it, and, consequently, in analyzing the evidence, we now address ourselves particularly to that point.
>
> * * *
>
> "In this case, the record fails to disclose a particle of evidence to prove or tending to prove that, when defendant made his promise, he had no intention of performing it. * * * Plaintiff's testimony, however, does not shed a particle of light upon whether or not defendant, at the time he made the promise, intended to perform it. Plaintiff's testimony leaves us totally in the dark upon that point, except for the presumption of law that when defendant made the promise he intended to perform it. That is the presumption. Good faith is presumed; fraud is never presumed. The burden of proving it is on the party alleging it." Cuckovich v. Buckovich, 82 Mont. 1, 264 Pac. 930, 932 (1928).

> "If fraud, other than that just considered, existed, it was only by reason of the making of a promise 'without any intention of performing it' . . .; but here both the pleading and the proof fall far short of making a case of fraud, as it is

that Elston did not intend, at the time the promise was made, to perform it; the allegations of the complaint and the testimony of the defendant go no farther than to charge that the promise was not performed. Defendant was not, therefore, entitled to go to the jury on this defense of fraud." Howe v. Messimer, 84 Mont. 304, 275 Pac. 281, 283 (1929).

"The mere making of a promise which the promisor fails to keep does not constitute actionable fraud. (Citing cases.)

"There being no allegation in the answer, nor proof that Bell did not intend to keep his promise to cancel and return the papers to defendants, and no offer by defendants to perform their part of the settlement agreement by payment of the money, defense upon that ground is not sustained." International Harvester Co. v. Merry, 60 Mont. 498, 199 Pac. 704, 706 (1921).

See also Marlin v. Drury, 124 Mont. 576, 228 P.2d 803 (1951).

c. Fraud Must be Pleaded and Proved -

Despite the liberality of pleading under the Federal Rules of Civil Procedure it is nevertheless necessary to plead fraud with particularity. Rule 9(b) of the Federal Rules of Civil Procedure provides as follows:

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

In Brooks v. Brooks Pontiac, Inc., 143 Mont. 256, 389 P.2d 185 (1964) the court stated with regard to pleading and proof of fraud the following:

"We return now to the allegation of the bare conclusion 'constructive fraud' previously alluded to. It has always been the rule in Montana that fraud is never presumed, and that such a charge must be sustained by the allegations and proof of the facts constituting the fraud. See Teisinger v. Hardy, 86 Mont. 180, 282 P. 1050, and Costello v. Shields, 99 Mont. 335, 43 P.2d 879. The rule is set forth in Rule 9(b), M.R.Civ.P.:

'" In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. * * *'

"Not having allegations of fact from which the conclusion of 'constructive fraud' might be reached, the attempt to state a claim for relief as a derivative action, as here, fails." 389 P. 2d at p. 188.

Damage is an essential element of fraud in Montana. In Holland Furnace Company v. Rounds, 139 Mont. 75, 360 P.2d 412 (1961) the court stated:

"Damage, injury, or prejudice from reliance on fraudulent representation is a necessary element of fraud whether fraud is being advanced as a ground for recovery or defense." 360 P.2d at p. 415.

Nowhere has plaintiff pleaded the materiality of the representations, his ignorance of the falsity of the representations, his reliance and his right to rely upon the truth of the representations, and his consequent and proximate injury by reason of his reliance.

B. THE JURY WAS IMPROPERLY INSTRUCTED ON THE ELEMENTS OF FRAUD

The court's instruction to the jury on the elements of fraud is set forth in the Statement of the Case, supra, p. 10. No mention is made in this instruction of the following essential elements:

(1) That plaintiff had a right to rely upon the representations;

(2) That the representations were material;

(3) That Mr. Burko intended that they should be acted upon;

(4) That plaintiff was actually injured by reason of the representations.

With respect to the measure of damages, the court was quite correct in limiting the damages to the amount paid for the franchise in view of plaintiff's early knowledge of the falsity of the representations. However, the court was not correct in stating that the measure of damage was $6,000.00 less what the jury found the franchise was worth on August 17, 1963, the date that the plaintiff discovered the falsity of the representations. At most, the damages should have been limited to the difference in value of the franchise from what it was as opposed to what it would have been had the representations as alleged been true as limited by the amount paid for it.

C. THE COURT ERRED IN ALLOWING PLAINTIFF TO TESTIFY AS TO ALLEGED MISREPRESENTATIONS NOT PLEADED

Also very important is the alleged representation concerning which plaintiff was allowed to testify which had not been pleaded or mentioned in the pre-trial order that the entire franchise fee of $6,000.00 would be used for the initial opening. This was particularly prejudicial and must have contributed to the inflaming of the minds of the jury on the fraud question. We submit that such a highly inflammatory representation must be pleaded and that it was error for the court to allow plaintiff to testify thereto. The defendant might well have been able to take some measures for defense against such an allegation had it been anticipated and had it not come as a surprise.

D. PLAINTIFF WAIVED ANY RIGHT HE MAY HAVE HAD TO SUE FOR DAMAGES FOR FRAUD

1. Argument on the Facts -

Plaintiff's theory was that after discovery of the falsity of the alleged representations, he affirmed and chose to proceed with the contract but preserved his right to sue for damages for fraud in the inducement thereof. We contend that under the circumstances here, his continuing with the contract was a waiver as a matter of law of his right, if any, to recover damages for fraud in the inducement.

The evidence is uncontradicted that the plaintiff discovered the falsity of the alleged representations in August of 1963. This was nearly two months prior to the time that he quit his job, received delivery of any cars and commenced operations. At that time he had not changed his position in any respect except for the payment of the franchise fee and the initial car rentals. At that time the contract was almost wholly executory. At that time it would have been a relatively simple matter to effectuate a rescission, if he were entitled to such relief. Instead, Carl Taute knowingly and deliberately elected to "give it a go" under franchise agreement and to try out the business.

Plaintiff's election to go ahead when he knew of the falsity of the alleged representations caused defendant to change its position to its detriment. Among other things, Econo-Car International, Inc. supplied plaintiff with the dealer's kit, advertized for his grand opening, sent a man to Billings for two days to assist the plaintiff to get his

business operating smoothly and to check operations and answered numerous letters and phone calls. In addition, plaintiff's election prevented Econo-Car from seeking another franchisee who may have been willing to continue to operate the business permanently. Thus, defendant has clearly been prejudiced if it now is required, in addition to the above changes of position, to return the $6,000.00 paid by Taute for the franchise. Is not plaintiff now estopped from claiming damages for the alleged fraud and barred by laches from pressing this claim? This situation is unquestionably illustrative of why the courts will generally hold that a plaintiff electing to affirm and ratify an executory contract waives any right to sue for damages for fraud in the inducement; whereas, if the contract is executed or nearly all executed when a party discovers fraud, he may be entitled to affirm the contract and sue for the fraud.

During the course of the operations, Carl Taute did numerous things which tended to indicate his decision to ride with the contract and not seek damages from Econo-Car. For instance, he humbly requested assistance of Paul McPeake in selecting a location in his letter dated September 14, 1963 (Dfdt.'s Exh. 23). In his termination letter mailed more than a year later, November 14, 1964, (Pltf.'s Exh. 21) in stating that the only criticism he had to offer was toward himself, that he simply bit off more than he could chew. In his letter of December 3, 1964, subsequent to his termination letter, he offered to continue the business if the company would put up a

considerable correspondence between the parties to mention, suggest or complaint about Burko's representations in any way.

Finally, the plaintiff entered into new engagements concerning the subject matter of the contract, such as advertising changes, reductions in rental payments on the automobiles, changes in insurance premiums, he borrowed money from Econo-Car International, Inc., and of course, he impliedly agreed to proceed under the contract knowing that the promises as he understood them would not be carried out. These activities bring him under the rule that if a party claiming to have been defrauded enters after the discovery of the fraud into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, he will be deemed to have waived any claim for damages on account of fraud.

2. Law on Waiver of Fraud -

Plaintiff's complaint appears to be founded upon the theory that the defendant was guilty of fraud in the inducement of the contract, and therefore, plaintiff was entitled to damages in the nature of restitution or rescission. But in the same complaint, plaintiff sought damages for breaches in the contract. These two theories are, of course, mutually exclusive and plaintiff was faced with the choice of either affirming the contract and attempting to recover some damages for the alleged fraud in the inducement and for the breach of contract, or of contending that he wanted the contract rescinded and was entitled to restoration of everything of value contributed by him. Plaintiff prior to trial elected to seek damages by way of breach of contract and damages for fraud in the inducement

while at the same time affirming and ratifying the contract. There are numerous Montana cases holding that a contract must be promptly rescinded upon discovery of fraud, or the plaintiff will have been held to have ratified the contract and waive the fraud:

Lommasson v. Hall, 111 Mont. 142, 106 P.2d 1089 (1940);

Beebe v. James, 91 Mont. 403, 8 P.2d 803 (1932);

Williams v. Hefner, 89 Mont. 361, 297 Pac. 492 (1931);

Lasby v. Burgess, 88 Mont. 49, 289 Pac. 1028;

McConnell v. Blackley, 66 Mont. 510, 214 Pac. 64 (1923);

Ott v. Pace, 43 Mont. 82, 115 Pac. 37 (1911).

Under certain circumstances it appears that a person who has been injured by fraudulent acts of another may affirm the transaction and sue for damages.

> "It is elementary that a person injured by the fraudulent acts of another may elect to rescind or may affirm the transaction and sue for damages." Como Orchard Land Co. v. Markham, 54 Mont. 438, 171 Pac. 274, 275 (1918).

Here, however, we contend that this rule is not applicable and that plaintiff actually waived his right, if any, to sue for damages for fraud because of his early knowledge thereof and his thereafter proceeding under the contract as if the fraud had never occurred. This question is discussed at some length in Koch v. Rhodes, 57 Mont. 447, 188 Pac. 933 (1920) as follows:

> "Appellants contend that the evidence shows a condonation of all fraud and fraudulent representations charged and waiver of all possible right of action for the same, because of the fact that respondent, after the commencement of this action, paid an installment falling due January 1, 1961. It is to be noted in this connection that respondent had been let into possession of the premises on July 11, 1915, and has paid to appellants $5,500; that he had elected

to proceed under the contract rather than to rescind it, and sue for damages for the alleged fraudulent representations.

* * *

"Under our statutes and under the authorities, one who has been fraudulently induced to enter into a contract has the choice of either rescinding the contract (Rev. Codes, § 5063) by restoring or offering to restore what he has received under the contract, and recover what he has parted with, or he may affirm the contract, keeping whatever property he may have received or advantage gained, or sue in an action for deceit for the damages suffered by reason of the fraud. While the affirmance of the contract precludes him thereafter from rescinding, he may still sue for damages, unless he waives that right. Como. Orchard Co. v. Markham, 54 Mont. 438, 171 Pac. 274. On the other hand:

> "'An executory contract which has been procured by fraud is not binding upon the party against whom the fraud has been perpetrated. He may, after discovering the fraud, either perform it or rescind it; and if, with knowledge of the fraud, he elects to perform it, this is equivalent to his making a new contract, and to permit him under those circumstances to recover for fraud would be to do violence to every rule upon which compensatory damages are allowed.' McDonough v. Williams 77 Ark. 261, 92 S.W. 783, 8 L.R.A. (N.S.) 452, 7 Ann.Cas. 276.

* * *

"And while by an affirmance of the contract one may waive, not only his right to rescind, but also his right of action for the deceit, it is only when such an intention is clearly manifested that such a waiver will be declared. There is a clear distinction between the waiver of the right to rescind and the waiver of the right of action. This is pointed out by Mr. Cooley in his work on Torts, par. 257, as follows:

> "'The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon, it should appear that the party having the right to complain of the fraud had freely

> some form clearly manifested his intention to abide by the contract and waive any remedy he might have had for the deception'." (188 Pac. at pp. 937-938). (Emphasis ours).

While involving an action for the cancellation of contract for the sale of real and personal property and for the return of certain money paid under the contract, rather than for actual damages for fraud in the inducement, in Ott v. Pace, 43 Mont. 82, 115 Pac. 37 (1911), the court discussed at length questions concerning waiver of fraud which are pertinent here. The court stated in part:

> "During all this time, plaintiff remained in possession of the premises and used them and appropriated the 1907 crops to his own use. Since fraud in the inducement of a contract does not make it void, but only voidable (Turk v. Rudman, 42 Mont. 1, 111 Pac. 739), it was within the power of Ott to rescind or to treat the first contract as valid (1 Page on Contracts, § 139; 9 Cyc. 432, 436); and his continuing in possession of the property and his payment of the delinquent installment after discovering the fraud amounted to an affirmance of the first contract and constituted a bar to a rescission (citing cases). In Grymes v. Sanders, 93 U.S. 55, 23 L.Ed. 798, the rule is stated as follows: 'Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had theretofore subsisted.' So, also, the substitution of the new contract for the old one amounted to a waiver of the fraud which entered into the execution of the old one." (115 Pac. at p. 39). (Emphasis ours).

In Hein v. Fox, 126 Mont. 514, 254 P.2d 1076 (1953) the court held among other things, that there had been a waiver of the requirement of approval of a contract by the FHA. The

court stated in connection therewith:

> "The approval by the agency was a condition precedent to the actual carrying out of the contract and ceased to be such by reason of the waiver.
>
> "A waiver may be by mere voluntary expression of waiver and nearly always by continuing to render performance or by receiving further performance from the other party, with knowledge that the condition has not been performed. 3 Corbin on Contracts, § 755, p. 918." (254 P.2d at p. 1079).

If a party claiming to have been defrauded enters after the discovery of the fraud into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, he will be deemed to have waived any claim for damages on account of the fraud. An excellent statement of this rule is found in the California case of Schied v. Bodinson Mfg. Co., Cal.App. 1947, 179 P.2d 380, as follows:

> "The authorities are uniform in holding that a party to an executory contract, who, with full knowledge of the facts constituting the fraud complained of, subsequently, with intention to do so, affirms the contract and recognizes it as valid, either by his written agreement or by acts and conduct, and accepts substantial payments, property or the performance of work or labor not required by the original contract, thereby waives his right to damages on account of the fraud. * * *
>
> "The rule with respect to waiver of fraud is stated in Burne v. Lee, supra, as follows:
>
> > "'Now, it is well settled that when a party has been induced by fraud to enter into a contract, he may elect either to rescind the contract by restoring whatever he has received under it, or he may affirm the contract, retaining whatever advantage he may have acquired, and still have his action for damages for deceit practiced upon him in making the contract. This rule is, however, subject to limitations which apply whether the contract, to which the charge of fraud is addressed, is an executed or executory contract. One of these limita-

been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject-matter of the contract to which the fraud applies, he is deemed to have waived any claim for damages on account of the fraud. The rule is clearly expressed in Schmidt v. Mesmer, 116 Cal. 267, 48 P.54, where it is said:

> "'If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must on his part comply with the terms of the contract; he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud.'' (Italics added).'

"The foregoing rule has been consistently followed in numerous cases. It is the accepted rule in all jurisdictions." 179 P.2d at p. 385.

Other cases involving waivers of provisions in a contract or the substitution of an executed oral contract for a provision in a contract are Dalacow v. Geery, 132 Mont. 457, 318 P.2d 253 (1957) and Flint v. Mincoff, 137 Mont. 549, 353 P.2d 340 (1960).

E. ALL TESTIMONY OF STATEMENTS ATTRIBUTED TO BURKO PRIOR TO OR AT THE TIME OF THE EXECUTION OF THE WRITTEN CONTRACT WAS INADMISSIBLE AS VARYING, ADDING TO, CONTRADICTING OR ALTERING THE WRITTEN CONTRACT

We have dealt with the parol evidence rule at some length in a preceding section of this brief with the emphasis there on its application to alleged fraud in inducement of a contract. Here, plaintiff has also contended that the alleged oral representations were admissible to explain the circumstances under which the contract was executed and to explain

ambiguities in the contract itself. There are a great many of cases in which evidence of oral negotiations and alleged agreements made at or prior to the execution of written instrument have been excluded by reason of the parol evidence rule. We wish to call the court's attention to a few of these cases.

In Riddell v. Peck-Williamson Heating & Ventilating Co., 27 Mont. 44, 69 Pac. 241 (1902) plaintiff subcontractor entered into a contract with the defendant to supply certain labor and materials in connection with the construction of the agricultural building at M.S.C. in Bozeman. When the greater portion of the materials and labor had been furnished and performed by plaintiff, plaintiff abandoned the work because defendant refused to pay for the labor and material already performed and furnished and sued the defendant for the value thereof. Plaintiff alleged that at the time that the written agreement was executed, an oral agreement was entered into that payments should be made, in conformity with a usage and custom, as the work was done and the material furnished. The written contract, itself, contained no express provision as to when the payments should be made, although the court did state that the intention of the parties from the agreement as a whole was that defendant should not become indebted to the plaintiff until all material was furnished and all labor performed. The court held that evidence as to the alleged oral agreement should have been excluded. The court stated in part:

> ". . .It is perfectly clear that the evidence was erroneously received. The rule which prohibits the reception of evidence of oral promises or agreements made prior to or contemporaneously with the execution of a written contract purporting to embrace all its

from the express terms, is declared and interpreted by the decisions of this court, as well as prescribed by statute. (Citing cases). This rule is applicable to oral negotiations and agreements which vary the legal construction and import of a written contract, although they do not contradict its express terms." (Emphasis ours). 69 Pac. at pp. 242-243.

In Rowe v. Emerson-Brantingham Implement Co., 61 Mont. 73, 201 Pac. 316 (1921) plaintiff brought an action for a breach of warranty of a threshing machine, on which a written warranty had been given by the defendant. Plaintiff contended that in addition to the written warranty, plaintiff's local sales agent made certain oral warranties and representations. The trial court excluded all evidence touching upon the prior statements and representations of the local agent in making the sale. The Supreme Court affirmed, stating in part:

"If in the warranty that the machinery ordered is 'to be well made, of good material, and with proper use and management to do as good work as any other machine of the same size manufactured for a like purpose' was comprehended a warranty that the thresher to be furnished would thresh and clean alfalfa as well 'as any other machine of the same size manufactured for a like purpose,' the written contract was complete and must be taken as a full expression of the agreement between the parties. This is so because therefrom it will be presumed that every material item and term has been placed therein. In such case parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids addition by parol where the writing is silent, as well as to vary where it speaks.

* * *

"The contention that, because 'the written contract is silent as to the special purpose for which the machine was bought,' the parol understanding between the local agent and the plaintiffs can be read into it, * * *

"To allow a claim of this sort to be maintained where the parties have put their engagements in writ-

warranties, and to completely ignore the rule that parol agreements leading up to the written contract are merged in it." 201 Pac. at p. 318.

In Cook v. Northern Pacific Railway Co., 61 Mont. 573, 203 Pac. 512 (1921) plaintiff shippers brought an action against defendant railroad for damages to shipments of lambs sent by railway from Montana to Chicago. The Supreme Court upheld the District Court's order striking all evidence relating to certain negotiations between the parties and oral directions given by the plaintiffs as to stops intransit, all as being in violation of the parol evidence rule, stating in part:

> "The negotiations between the parties and the directions, given by the shipper preceding the execution of the contract and acceptance of it by him, are presumed to have been merged in the contract itself when it has assumed its final form, and evidence of terms other than those contained in it become wholly incompetent, unless a mistake or imperfection in it has been put in issue by the pleadings, or its validity has become the fact in dispute, or it has become necessary to explain an intrinsic ambiguity in the contract or to establish illegality or fraud." 203 Pac. at 515.

In Burnett v. Burnett, 68 Mont. 546, 219 Pac. 831 (1923) the court held that where a note left blank the amount of interest to be charged, oral testimony that the parties understood that the note was to be noninterest bearing was held to be inadmissible, the court stating in part:

> "In the absence of fraud or mistake, neither of which is alleged in the present case, 'when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing.' Section 10517, Rev.Codes, 1921. In this case the best and only evidence of the contract is the writing itself. Id. 10516.

"The written contract superseded all prior negotiations and agreements, and to it alone must we look to determine the obligation of the defendant. (Citing cases).

"Evidence offered to show the understanding of the parties as to the payment of interest at the time of the execution of the note was properly excluded." 219 Pac. at p. 832.

The circumstances suggesting that it would be proper to allow parol evidence to explain or add to the terms of a contract would certainly have been greater in the above case, than in the instant case. Yet, this case along with a number of others cited herein illustrate the vigorousness with which the Montana Supreme Court has followed the parol evidence rule. See also Leigland v. McGaffick, 338 P.2d 1037, 135 Mont. 188 (1959); Arnold v. Fraser, 43 Mont. 540, 117 Pac. 1064 (1911); Hosch v. Howe, 92 Mont. 405, 16 P.2d 699 (1932); Armington v. Stelle, 27 Mont. 13, 69 Pac. 115 (1902); Ryan v. Ald, Inc., 146 Mont. 299, 406 P.2d 373; Ikovich v. Silver Bow Motor Car Co., 117 Mont. 268, 157 P.2d 785 (1945); Union Electric Co. v. Lovell Livestock Co., 101 Mont. 450, 54 P.2d 112 (1936); Linn v. French, 97 Mont. 292, 33 P.2d 1002 (1934); and Swan v. LeClaire, 77 Mont. 422, 251 Pac. 155 (1926).

There are a number of Montana cases in which the Supreme Court has allowed parol evidence under one of the exceptions to the parol evidence rule. Cases of this type which we have examined are clearly distinguishable from the present facts and no attempt will be made to discuss them all here. We are listing three examples of types of such cases which we believe to be typical:

Platt v. Clark, 141 Mont. 376, 378 P.2d 235 (1963)
(Court admitted parol evidence to show that the contract had never taken effect.)

Hammond v. Knievel, 141 Mont.433, 378 P.2d 389 (1963)
(Evidence admitted to show that what appeared to be a contract was in fact not a contract.)

New Home Sewing Machine Co. v. Songer, 91 Mont. 127, 7 P.2d 238 (1932)
(Court allowed oral testimony to explain the term "finance plan" contained in an order for 20 sewing machines where radically different versions of what the term meant were presented by the parties, and where the writing clearly and on its face did not contain all of the terms and conditions of the agreement.)

The trial court ruled that the word "guidance" as used in paragraph 4. C. of the contract and other words of the contract were ambiguous and that the oral representations were admissible to explain the meaning thereof. We vigorously contend, however, that the word "guidance" as used and explained in the contract (see page 6, supra) is clearly not ambiguous and that any outside evidence to explain the meaning of the word is in clear violation of the parol evidence rule as interpreted by the Montana State Supreme Court. Instead of explaining the meaning of "ambiguous" terms or explaining the circumstances surrounding the execution of the contract, the representations here add to, vary, amplify and in some respects contradict the language of the contract and are therefore to be excluded.

F. THERE WAS NO BREACH OF CONTRACT AS TO THE LEASE TERM ARRANGEMENTS AS A MATTER OF LAW

As is evident from the statement of facts (p. 2, supra) the franchise agreement (Pltf.'s Exh. 6) contemplated

that there would be periodic changes in the basis for supplying rental cars to the local dealers. For example, paragraph 5. C. provides that vehicles would be acquired by the Econo dealer on the basis described in Schedule "B" to the franchise agreement, or "upon such other basis as may be presented by Econo-Car for the benefit of the entire Econo-Car rental system." This is entirely logical in view of the constantly changing conditions and terms under which Econo-Car International, Inc. would be able to acquire the cars from Chrysler Leasing Corporation or from any other firm. They would certainly want to remain flexible as to such arrangements.

The lease term in the original franchise agreement was simply from "12 months to a maximum of 18 months", with no comment as to who had the option. However, on August 17, 1963, the plaintiff signed Exhibit No. 7 providing for an 18 month term with Econo-Car International, Inc. having the absolute right to terminate the lease at any time following the twelfth month. Later on, it was announced that the 1964 automobiles would be available on a 12 month leasing term, instead of the previous 18, and finally Econo-Car International, Inc. offered the 1965 cars on a 6 month leasing term with it having the option to extend by one month and with the dealer having the option to extend by 6 months. We submit that these changes were violative of the terms of and in fact contemplated by the basic franchise agreement. In addition plaintiff has completely failed to show that he was damaged by any of these changes in lease terms, and for that matter, it is implicit in the evidence and is apparent by the use of common sense that the

shorter the lease term within limits upon which these cars are available, the greater advantage to the local Econo dealer.

Much controversy occurred during the trial with respect to the so-called "turn in" requirements. It is worthy of note that Plaintiff's Exhibit 6 does not specify any such turn in requirements. Plaintiff complained bitterly at the trial that he was billed for over $400.00 worth of turn in charges at the time he surrendered his automobiles. Upon cross-examination, however, it was brought out that Econo-Car International, Inc. went to bat for the plaintiff with Chrysler Leasing Corporation and effectively got the turn in charges reduced. The maximum possible damages which he proved in this connection, even if it be assumed that the requirements were tied in to the basic franchise agreement was by plaintiff's own testimony $20.50 for one tire.

G. THE COURT ERRED IN INVADING THE PROVINCE OF THE JURY IN ITS INTERPRETATION OF THE LEASE TERM PROVISIONS AND THE INSURANCE TERM PROVISIONS OF THE CONTRACT

In instructing the jury on the lease term provisions, the court peremptorily charged them that unless they found there was modifications assented to by the plaintiff, he was entitled to any damages for an early termination of the 18 month lease term set forth in Plaintiff's Exhibit 7. We feel that this was error.

The court also instructed the jury that the defendant breached the insurance term provisions and that the plaintiff was entitled to the difference in the insurance premiums for $100.00 deductible and $250.00 deductible. We feel that

this was clearly error, in view of the uncontradicted testimony that the monthly rental payments to Econo-Car International, Inc. for rental, insurance, etc. were consolidated and that at all times during the operations plaintiff was paying an amount equal to or less than that required by his original franchise agreement for the automobiles.

The court was, of course, correct in instructing that the plaintiff had failed to prove any damages by reason of the alterations in the advertising program. In fact, the plaintiff had received considerably more than he was entitled to under the original franchise agreement.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be vacated and judgment entered for the defendant.

Respectfully submitted,

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER

By George C. Dahlberg
500 Electric Building
P. O. Box 2529
Billings, Montana 59101
Attorneys for Defendant and
Appellant Econo-Car
International, Inc.

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of April, 1968, I deposited in the Post Office at Billings, Montana, in an envelope securely sealed, with postage thereon prepaid, and addressed to:

John C. Sheehy, Esquire
Hutton, Schiltz & Sheehy
Attorneys at Law
Electric Building
Billings, Montana 59101,

true and correct copies of the foregoing Brief of Appellant Econo-Car International, Inc.

George C. Bethay

One of the Attorneys for Defendant and Appellant Econo-Car International, Inc.

CONO-CAR INTERNATIONAL, INC

ECONO-DEALER APPOINTMENT PROGRAM AND AGREEMENT

PARTIES:

A. ECONO-CAR INTERNATIONAL, INC., a New Jersey Corporation having its principal office and place of business at 520 Westfield Avenue, Elizabeth, New Jersey, referred to in this agreement as "ECONO-CAR".

B. Carl M Tout (NAME), a _____ (STATE) (corporation) (partnership) (individual proprietorship), having its or his principal office and place of business at 2112 Queen Terrace Drive (ADDRESS) in the city of Billings, Montana (STATE) and referred to in this agreement as "THE ECONO-DEALER".

EXCLUSIVE FRANCHISE:

Upon the acceptance of this agreement and the payment by Applicant of the sum of $ 6,000.00 in cash or certified check, as a franchise fee, ECONO-CAR does hereby award to the ECONO-DEALER the exclusive license for the operation of a daily rent-a-car business to the public under the trade names "ECONO-CAR" and "ECONO-CAR RENTAL SYSTEM" for:

Yellowstone County, Montana.
East Gallatin County Bozeman Montana Livingston Montana
Butte city Montana, Cody Wyoming & Sheridan Wyoming

TERM:

This agreement shall continue for a term of fifteen (15) years unless terminated sooner for any reason provided in paragraph "12", and may be renewed for successive fifteen (15) year periods at the option of the ECONO-DEALER at no additional cost, provided that the ECONO-DEALER has complied with the obligations set forth in this agreement.

ECONO-CAR AGREES:

A. To permit the ECONO-DEALER, throughout the term of this agreement, to use its trademarks, trade names, logotypes and service marks in accordance with company policy and specifically, to display the names ECONO-CAR and ECONO-CAR RENTAL SYSTEM prominently in all local advertising and at the ECONO-DEALER's premises.

B. To ship the ECONO-DEALER immediately upon the acceptance of this agreement, the Basic ECONO-DEALER's Kit described in the schedule "A" annexed to this agreement and made a part hereof.

C. To furnish guidance to the ECONO-DEALER in establishing, operating, and promoting the business of renting automobiles, with respect to:
   a) The selection of premises for the establishment of places of business.
   b) The institution and maintenance of effective and proven office management systems and business operations procedures.
   c) The institution of an effective and continued sales promotion campaign, making available to the ECONO-DEALER sales and promotional aids above and beyond the Basic ECONO-DEALER's Kit, as and when such aids are developed by ECONO-CAR's staff.

D. To make available to the ECONO-DEALER at all times a quantity of automobiles for use in the daily rent-a-car business on the most favorable terms available. These vehicles may be made available to the ECONO-DEALER on the basis of sale, lease, or whatever other method or methods that ECONO-CAR shall negotiate in behalf of all of its ECONO-DEALERS.

ECONO-CAR will, in every case, deliver to the ECONO-DEALER as many cars as the ECONO-DEALER may request, subject to the ECONO-DEALER's financial status and ability to meet existing business obligations.

E. To provide the ECONO-DEALER, at no additional expense, with standard-type automobile insurance providing the following coverage: Automobile public liability and property damage insurance with limits of not less than $250,000. for any one person for bodily injury or death and $500,000. for any one accident for bodily injury or death; $25,000. insurance for property damage; collision insurance with no more than $100 deductible, and automobile and physical damage insurance which shall include fire, theft and combined additional coverages, including vandalism and malicious mischief, with a $50. per loss deductible. Coverage shall extend to the ECONO-DEALER, his agents and employees and those who rent from the ECONO-DEALER in the course of his operation of a bona fide rent-a-car service.

F. To pay to every ECONO-DEALER in good standing a cooperative advertising allowance of up to $7.50 per month per car operated by the ECONO-DEALER during the preceeding month, upon receipt of proof of local advertising by the ECONO-DEALER in the minimum amount of $15.00 per month per car; classified directory advertising shall not be eligible for this allowance.

THE ECONO-DEALER AGREES:

A. To devote sufficient time and best efforts to the development and growth of the auto rental business as a member of the ECONO-CAR RENTAL SYSTEM.

B. To advertise and promote the ECONO-DEALER's association with the ECONO-CAR RENTAL SYSTEM through the use of the trade names and styles designated by ECONO-CAR. The ECONO-DEALER may not use the name ECONO-CAR, in whole or in part, within the ECONO-DEALER's corporate or official business name, but shall, nevertheless, prominently display or use in predominant size the names ECONO-CAR and ECONO-CAR RENTAL SYSTEM in all advertising, signs, displays, literature, letterheads, etc.

C. The ECONO-DEALER agrees to add to his fleet of operating vehicles (excluding replacement vehicles) a minimum of 1 autos during each quarter of the first two years of this agreement and a minimum of 4 autos each year thereafter for three (3) sucessive years. No additions will be required thereafter, but the ECONO-DEALER shall at all times maintain an active fleet of at least the same size as exists at the end of the fifth year; all vehicles must be acquired by the ECONO-DEALER on the basis described in schedule "B", or upon such other basis as may be presented by ECONO-CAR for the benefit of the entire ECONO-CAR RENTAL SYSTEM.

D. To maintain the ECONO-DEALER's place or places of business and the ECONO-DEALER's vehicles in a clean and presentable condition, and all vehicles shall be physically maintained in top operable condition.

E. To operate the ECONO-DEALER's business in accordance with sound business principles, while adhering to the standards set in the ECONO-DEALER's Manual, and to any modifications or changes which may be promulgated from time to time by ECONO-CAR for the benefit of the entire ECONO-CAR RENTAL SYSTEM and each of its ECONO-DEALERS.

F. To charge to the public for the rental of motor vehicles, a sum no greater than the rate fixed, from time to time, by ECONO-CAR.

G. To make available to ECONO-CAR or to its duly authorized representatives, for purposes of inspection only, the ECONO-DEALER's books and records; such inspections shall take place only during ordinary business hours.

H. To proceed immediately to obtain a listing and a display advertisement in all classified telephone directories servicing the territory covered by this agreement.

I. To pay any and all federal, state, city or local taxes, fines or assessments that concern the operation of the ECONO-DEALER's business, his stock of vehicles or his assets.

. NATIONAL PROMOTIONS:

ECONO-CAR may, from time to time, engage in national contests and promotions for the benefit of the entire ECONO-CAR RENTAL SYSTEM. In the course thereof, ECONO-CAR may be required to issue "due bills" which shall be redeemable by contest winners and other recipients, at any authorized ECONO-DEALER's place of business, to be applied as a credit against car rental. The ECONO-DEALER shall accept all such "due bills" as may be tendered, to be applied at their full face value against actual rental invoices. The ECONO-DEALER may then use such "due bills" so collected as cash at 50% of face value, to be applied against the ECONO-DEALER's monthly obligations to ECONO-CAR. In no event shall the ECONO-DEALER be obligated to sustain a net cost of more than $300. per year in the redemption of such "due bills", and accordingly, when and if this limit is exceeded, the remainder, if any, shall be redeemed by ECONO-CAR at full face value.

. AGENCY:

The ECONO-DEALER is an independent contractor, and is in no sense a legal agent or officer of ECONO-CAR, and has no authority to bind ECONO-CAR in any manner whatsoever.

. INDEMNITY:

The ECONO-DEALER shall indemnify ECONO-CAR and hold it harmless from any claims, demands, liabilities, actions, suits or proceedings asserted by third parties, and arising out of the ECONO-DEALER's business.

. LOCAL CODES AND ORDINANCES:

The ECONO-DEALER shall be solely responsible for compliance with all local laws, orders, codes or ordinances applicable to the ECONO-DEALER's business.

. ASSIGNMENT:

This agreement may not be assigned by the ECONO-DEALER without the prior consent, in writing, of ECONO-CAR, which consent shall not be unreasonably withheld. Consent is hereby given to the ECONO-DEALER, if an individual or partnership, to assign this agreement to a corporation in which the ECONO-DEALER holds at least fifty-one percent (51%) of the capital stock.

. EXCLUSIVITY OF BUSINESS:

Neither the ECONO-DEALER nor the ECONO-DEALER's principals shall, directly or indirectly, during the term of this agreement or for a period of two years after the termination of the agreement, and within a radius of 50 miles of the territory herein granted, engage in any activity in competition with the business of ECONO-CAR, whether individually, or through a partnership or corporation.

. WAIVER:

Failure by ECONO-CAR to enforce any of the provisions of this agreement shall not constitute a waiver of ECONO-CAR's rights or of the ECONO-DEALER's default, if any.

. TERMINATION:

The ECONO-DEALER may terminate this agreement at any time by giving ECONO-CAR ninety (90) days notice in writing; such termination shall not relieve the ECONO-DEALER from any obligation that shall have matured hereunder or under any collateral written agreement of the parties. ECONO-CAR may terminate this agreement only upon the occurrence of any of the following conditions:

A. If the ECONO-DEALER shall fail to meet any obligation provided for in this agreement, where such failure shall continue for ten (10) days or more following the mailing to the ECONO-DEALER of written notification of default.

B. Where the ECONO-DEALER discontinues the active conduct of his business.

C. Upon the transfer or assignment of any part of the ECONO-DEALER's business or assets, which results in the passage of control of the business, unless consented to in writing by ECONO-CAR.

D. Upon the insolvency or bankruptcy of the ECONO-DEALER, voluntary or involuntary, the making of an assignment for benefit of creditors, appointment of a receiver or trustee of any part of the assets of the ECONO-DEALER's business, the service of a warrant of attachment upon any of the assets of the business or upon service of an execution.

E. If the ECONO-DEALER shall breach any collateral written agreement between the parties.

Upon termination of this agreement, the ECONO-DEALER shall return to ECONO-CAR, or effectively destroy, all literature, signs, advertising material, promotional matter, manuals and other materials identifying the former ECONO-DEALER with ECONO-CAR and shall immediately cease to refer to or identify himself or itself with ECONO-CAR or with any other trade name or symbol employed by ECONO-CAR. The ECONO-DEALER shall arrange for the cancellation of all telephone listings obtained in the ECONO-CAR name and shall release to ECONO-CAR or its designee all telephone numbers included in such listings. The ECONO-DEALER shall thereafter take no action detrimental to ECONO-CAR or the ECONO-CAR RENTAL SYSTEM.

MODIFICATION:

This agreement constitutes the entire agreement of the parties and may not be modified, except in writing, executed by an authorized officer of ECONO-CAR.

APPROVAL:

This agreement shall become effective upon its acceptance in Elizabeth, New Jersey by an authorized officer of ECONO-CAR. Approval shall be evidenced only by the execution of this agreement by such authorized officer and by the mailing to the ECONO-DEALER of an executed copy. This agreement shall be construed and enforced in accordance with the laws of the State of New Jersey, and nothing herein contained shall be construed as doing business in any other state. If any provision of this agreement in any way contravenes the laws of any state or jurisdiction, such provision shall be deemed not to be a part of this agreement in that jurisdiction, and the parties agree to remain bound by all remaining provisions. This agreement terminates and supercedes any prior agreement of the parties.

x _____
ECONO-DEALER-APPLICANT

CEPTED:

ONO-CAR INTERNATIONAL, INC.

_____ Vice-Pres.

TE: June 28, 1963

SCHEDULE "A"
OF
THE ECONO-CAR RENTAL SYSTEM
ECONO-DEALERSHIP AGREEMENT

he following items are included in the new ECONO-DEALER's Set-Up Kit:

1. The ECONO-CAR OPERATIONS AND PROCEDURES MANUAL is the ECONO-DEALER's best iend. All facets of the ECONO-DEALER's operation are discussed in depth. All new ECONO-EALERS are invited to attend THE ECONO-CAR TRAINING SCHOOL in Elizabeth, New Jersey. ere the ECONO-DEALER is taught the Auto Rental Business including the use of all forms and ystems. The Operations and Procedures Manual serves as a constant reminder of the things learned the TRAINING SCHOOL. Specially trained field representatives provide additional on the spot aining and help.

2. CONSTANT HELPS pour out from the home office in the form of a Newsletter called THE CONO-GRAM. This includes continuing announcements of new Advertising and Publicity which are nstantly produced by our Advertising Department.

3. OPERATIONAL FORMS: Enough forms for the first 60 days operation are supplied free of arge. These include Car Rental Agreements, Qualification cards, Car Control cards, Condition eports and many other ECONO-CAR forms used in the ECONO-DEALER's business.

4. SALES FORMS: These include letterheads and envelopes, display sheets, ad mats, post cards, te folders, dresser tents, banners, electric signs, reservation forms, etc., etc. The value of these les items exceeds $500.00.

5. ANNOUNCEMENT ADVERTISING: ECONO-CAR places and runs at its own expense ads in e new ECONO-DEALER's newspaper to prepare the area for the new ECONO-DEALER.

6. PUBLICITY: Publicity releases are made to the ECONO-DEALER's newspaper of the new CONO-DEALERSHIP.

SCHEDULE "B"
OF
THE ECONO-CAR RENTAL SYSTEM
ECONO-DEALERSHIP AGREEMENT
THE ECONO-CAR LEASE PLAN

In consideration of the granting by ECONO-CAR of the exclusive ECONO-DEALERSHIP outlined n the agreement to which this schedule is attached, it is further agreed as follows:

1. ECONO-CAR does hereby extend to the ECONO-DEALER the full benefits of the ECONO-CAR EASE PLAN. Specifically, the ECONO-DEALER may lease from ECONO-CAR new current model year HRYSLER automobiles, for use in the daily rent-a-car business, at the following monthly rentals:

Two Door Valiant, Model V100	$129.00
Four Door Valiant, Model V200	134.00
Four Door Dodge Dart	134.00
Four Door Plymouth Savoy	139.00
Four Door Dodge 300	142.00
Plymouth Convertible (V-8)	157.00
Plymouth Savoy Four Door Station Wagon	152.00
Four Door Chrysler Newport	162.00

2. The monthly rentals set forth above shall include the insurance coverage described in the CONO-DEALERSHIP AGREEMENT, as well as all delivery and destination charges. All vehicles re to be equipped with automatic transmission, radio, heater, 2 seat belts, and left outside mirror. ach lease shall run for a minimum period of twelve (12) months to a maximum of eighteen (18) months. security deposit of $100.00 per vehicle and the first month's rent in advance shall be paid to CONO-CAR with each order. The monthly rentals do not include city, state or local taxes, if any, censing or registration charges or fees or inspection fees, if any. The ECONO-DEALER shall exeute a standard form of ECONO-CAR LEASE AGREEMENT before delivery of any vehicles.

3. The ECONO-DEALER does hereby place the following order, to be delivered immediately or as oon as such vehicles may be made available for delivery.

3 Two Door Valiants, Model V100
3 Four Door Valiants, Model V200
4 Four Door Plymouth Savoy Sedans

The ECONO-DEALER's check in the amount of $2,345 (in addition to the franchise ee provided for in paragraph "2" of the ECONO-DEALERSHIP AGREEMENT), representing security eposits of $100.00 per vehicle plus the first month's rent in advance on this order, is included ith this order.

Dated June 28, 1963

x Carl M. Pantle

By _____

Accepted:

ECONO-CAR INTERNATIONAL INC.

By Paul L. Herzog, Vice Pres

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE C. DALTHORP
Attorney